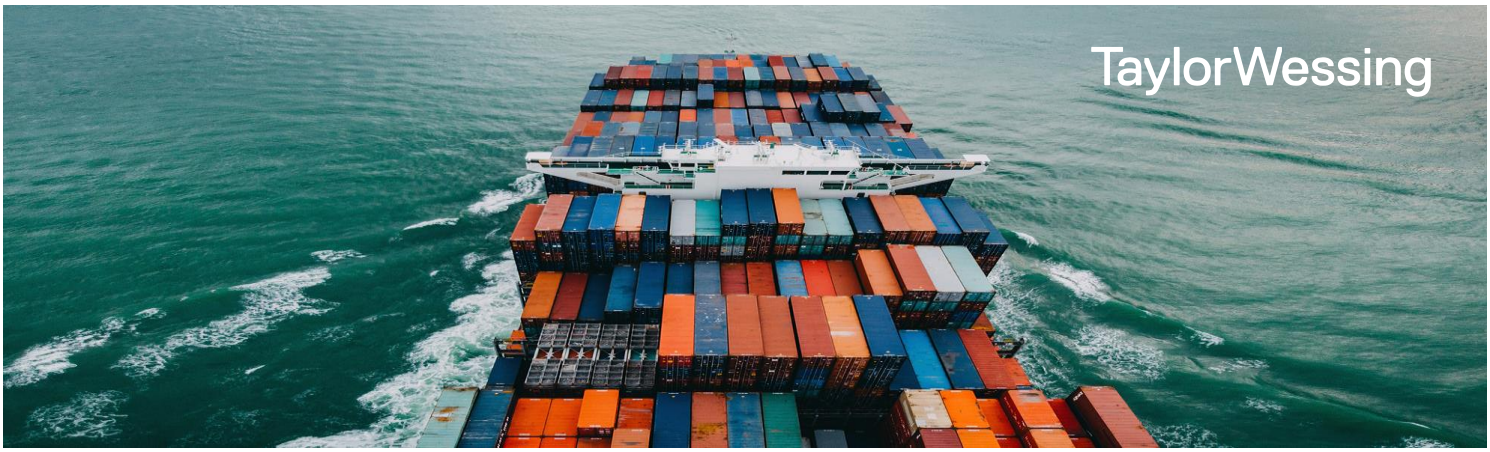

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CHECKLIST FOR EXPORT CONTROL

CONTENT

INTRODUCTION

The area of foreign trade and exports has always played a special role for Germany as one of the leading export nations: German companies depend on being able to operate in foreign trade that is as free as possible. In this context, a large number of export control regulations must be observed, which are enforced by the threat of severe fines and penalties. These involve personal liability risks for the members of the company management (person responsible for exports).

After a long period of global liberalisation with the dismantling of tariffs and non-tariff trade barriers, the last few years have been characterised by protectionist tendencies. The inauguration of the Biden administration has brought some relief. Nevertheless, the punitive tariffs imposed by the EU against the USA in November 2020, for example, are still in force. In recent years, the number of embargoes and licensing requirements for exports has also risen steadily. Further complication arises from the finalisation of Brexit.

Against this background, the export control requirements for companies are constantly increasing. This export control checklist explains the duties of the member of the management responsible for exports (person responsible for exports) after presenting the principles and necessity of internal export control. The framework conditions for an effective export control organisation are presented below.

PRINCIPLES OF EXPORT CONTROL

In Germany, the **principle of free movement of goods** applies to foreign trade in accordance with Section 1 of the Foreign Trade and Payments Act ("**AWG**"). In order to be able to safeguard higher-ranking protected property, there are restrictions to the principle of the free movement of goods pursuant to Section 4 AWG.

The control mechanisms of foreign trade law are to a certain extent prescribed by international agreements (in particular the so-called export control regimes for the control of goods that can be used for the production of nuclear, biological or chemical weapons, launchers and conventional weapons and armaments). Therefore, export control law is uniformly regulated in many areas at European level. Moreover, the European Union is known to be a single customs territory. The legal basis of European customs law is the so-called EU Customs Code - Union Customs Code ("**UCC**"). However, the most important set of regulations with regard to export control is the so-called **Dual-Use Regulation** (Council Regulation (EC) No. 428/2009) of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items ("**Dual-Use Regulation**"), which has been directly applicable in all Member States since 27 August 2009. As of 15.12.2020, the annexes to the Dual-Use Regulation were replaced and the lists of controlled goods contained therein were updated.

After four years of negotiations, the Commission, the EU Council and the European Parliament reached agreement on the amended version of the Dual-Use Regulation in November 2020. The amended regulation is expected to enter into force in the third quarter of 2021 and replace the Dual-Use Regulation. The focus of the reform is the improvement of export controls in the area of digital technologies. In future, stricter control regulations will apply to the export of certain interception and surveillance technology. With the introduction of a so-called "catch-all clause", surveillance technologies that can be used in connection with internal repression and/or the commission of serious violations of international human rights become subject to controls.

In addition to revising basic definitions, the amendment aims to further harmonise the EU-wide control system by establishing a common export control network. The two additional general export authorisations for intra-company technology transfer and for cryptographic goods/encryption technologies are likely to be of particular practical relevance. The new version also provides for a special licensing procedure for exports for the purpose of a specific large-scale project. The amended Dual-Use Regulation provides for a more flexible adaptation of the annexes in future by transferring the competence to revise the lists to the EU Commission.

Definition of export control

The term **export control** means that the delivery of various goods to other countries may be subject to a licence. In exceptional cases, the delivery of goods can also be prohibited. This applies above all to deliveries to countries where there is a state ban on trade (**embargo**). Certain obligations to act can thus be imposed in order to safeguard higher-ranking protected property.

In addition, there are further export restrictions under European law for specific areas, such as:

- Regulation (EC) No. 2019/125 of the European Parliament and of the Council dated 16.01.2019 on the trade of certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment ("**Anti-Torture-Regulation 2019**"), which replaces the previous Regulation (EC) No. 1236/2005 together with all amending and implementing regulation;
- Regulation (EC) No. 116/2005 of the Council dated 18.12.2008 on the export of cultural goods ("**Cultural Goods Regulation**");
- Added to this comes Directive 2009/43/EC of the European Parliament and of the Council dated 06.05.2009 simplifying terms and conditions of transfers of defence-related products within the Community ("**Directive on intra-EU-transfers if defence-related products**"). The aim of this Directive is the simplification of the approval procedures for military equipment in Part I Section A of the Export List within the EU. Since a Directive, unlike a Regulation, is not directly applicable, it must first be transposed into national law within a certain period of time. This was achieved by the German legislator with the Act dated 27.07.2011 on the Implementation of the Directive 2009/43/EC of the European Parliament and of the Council dated 06.05.2009 on simplifying terms and conditions of transfers of defence-related products within the Community (BGBl. 2011 I 1595), which included corresponding amendments to the AWG and to the Foreign Trade Ordinance ("**AWV"**).

A complete harmonisation of export controls has so far failed due to the reservations of the individual Member States. Therefore, the European regulations continue to be supplemented by national law, in Germany in particular by the AWG and the AWV, both of which were most recently tightened up this year.

GENERAL QUESTIONS ON EXPORT CONTROL

In order to be able to set up export control in the company in a meaningful way, companies must first ask themselves the following fundamental questions in this context.

What is being exported?

Extensive lists exist in which goods are listed that are subject to restrictions under foreign trade law. The list of dual-use items contained in Annex I of the Dual-Use Regulation is of particular importance in this context (**dual-use items**). This means goods, including data processing programmes and technology, which can be used for both civil and military purposes, **Article 2 No. 1 of Regulation (EC) 428/2009**. Germany also has the Export List (**AusfuhrL**), which lists military equipment and some additional dual-use items. Other lists are contained in the KrWaffG, for example.

The legal consequence of naming certain goods in a list is generally an **obligation to obtain a licence**, e.g. pursuant to Art. 3 (1) of Regulation (EC) 428/2009 or Section 8 of the AWV.

Checklist for export control

If you or the company you are working for wants to export goods to a third country or an EU Member State, you must be aware of the following:

- what are you exporting
- to whom are you exporting
- to which country are you exporting
- and for what purposes are the goods being supplied.

To which country will the goods be exported?

In the case of transactions with embargoed countries, particular care must be taken to check whether the planned action and/or the underlying legal transaction are affected by the restrictions (**total embargo, partial embargo or arms embargo**).

In the case of a planned delivery of non-listed goods to a military recipient in a country against which an arms embargo has been imposed, the requirement for a licence should be checked in accordance with the so-called "catch-all clause" and, if necessary, coordinated with the Federal Office of Economics and Export Control ("**BAFA**"). This applies regardless of whether the goods are included in military equipment or not (see Art. 4 para. 4 Regulation (EC) 428/2009).

To whom will the goods be supplied?

Within the scope of export control, it must be checked whether business partners are possibly included in a so-called sanctions list. In addition to country-based embargoes, there are security measures that are person-based or targeted at companies and organisations.

In addition to the EU's anti-terror regulations, it is advisable to also check the US lists, as a violation can result in serious consequences, namely a US trade ban, up to ten years' imprisonment and fines.

For what purposes are the goods being supplied?

Restrictions may exceptionally also apply to non-listed goods, namely if the exporter has either been informed by BAFA or has positive knowledge that the goods are intended for certain outlawed uses. These uses include:

- the use in the manufacture of weapons of mass destruction or delivery systems for such weapons (Article 4 para. 1 Regulation (EC) 428/2009),
- the military use in a country against which there is an arms embargo in place (Article 4 para. 2 Regulation (EC) 428/2009),
- the use in illegally exported military equipment (Article 4 para. 3 Regulation (EC) 428/2009),
- as well as the use in a nuclear facility in Algeria, Iraq, Iran, Israel, Jordan, Libya, North Korea, Pakistan or Syria (Section 9 AWV).

The legal consequence of BAFA informing the exporter of a possible outlawed use is an obligation to obtain a licence. If the exporter is positively aware of a planned use for one of the above-mentioned purposes, there is an obligation to inform BAFA. BAFA then decides on the existence of a licence obligation (and, if applicable, on the granting of a licence at the same time). Positive knowledge of one of the above-mentioned purposes does not generally exist in the case of gross negligence and the exporter is not obliged to make enquiries. However, the exporter must not deliberately turn a blind eye to clear indications.

INTERNAL COMPLIANCE PROGRAMME (ICP)

Especially in large companies with international trade in goods and services, export control should be integrated into the general compliance organisation. In principle, there is no obligation to carry out internal export controls. However, in order to avoid liability risks under criminal and administrative law as well as under civil law and to prevent negative consequences for acting employees, it is recommended to set up an internal compliance programme in relation to export control (ICP). A structured and organised process is essential for success. As a first step, the company should hire competent export control staff and define concrete responsibilities. In addition, an export officer should be appointed to act as a central point of contact both internally and for the customs authorities and BAFA. Regular training of employees is crucial for success. Only in this way are employees able to ensure compliance with legal requirements. Those responsible should create a clear organisation within the company. Technical, personnel and organisational measures can support export control and simplify internal processes. The most important task is the obligation to regularly monitor and control. Processes should be documented and always improved and adjusted.

Practice has shown that it is imperative that internal company export control be located at the level of company management in order to actually be able to guarantee comprehensive compliance with export regulations in relation to other business

interests and to prevent responsibility from being shifted to lower-ranking employees. Therefore, the "Announcement on the Principles of the Federal Government for the Examination of the Reliability of Exporters of War Weapons and Armament-Related Goods" of 27.07.2015 stipulates under Clause 1, that export licences may only be issued if, depending on the legal form of the applicant, a member of the board of directors, a managing director or a shareholder authorised to represent the company is named as the person responsible for exports vis-à-vis the approval authority - i.e. BAFA in Germany.

Export control should be integrated into company processes as early as possible. For example, list-bound approval obligations are dependent on certain performance parameters of the exported products. If necessary, this can be taken into account in product planning in such a way that products are manufactured which, although they can be used by most civilian customers without restriction, are nevertheless located just below the limit of needing approval in terms of their performance. The principle that export control should be integrated into the processes as early as possible also applies to the initiation of a contract, especially the first contact with a customer. This is the only way to ensure that suspicious circumstances are specifically registered with regard to the use-related export restrictions and that as much information as possible is collected about the buyer ("**know your customer**").

US-RE-EXPORT CONTROL

An additional control of the item to be exported must be carried out by the responsible persons if it is a US product. For this criterion to be met, it does not have to be a product actually produced in the US. In accordance with the de minimis regulation, it is sufficient if the product has been produced from 25 % US components. In this case, it is a "US product". For some countries (currently Iran, Sudan, Syria, North Korea and Cuba), this de minimis threshold is even 10 % of the product components from the USA.

In addition, there are other cases in which compliance with US export control law is advisable for companies:

- Re-export of US goods
- In the case of corporate affiliations with US companies (parent companies/subsidiary companies)
- Export of goods incorporating semi-finished products with US origin

This test also applies in cases where the goods are not exported from the USA (**extraterritorial effect**), e.g. when a US good is exported from Germany.

LEGAL CONSEQUENCES OF BREACHES

The range of legal and financial consequences in the area of export control is broad and extends from civil law (e.g. **contractual penalties**) to **criminal law sanctions**. Particularly serious is the possible criminal prosecution of those responsible. Thus, according to Section 17 para. 1 AWG, Section 18 para. 1 AWG, anyone who violates economic sanction measures is punished with imprisonment of up to ten years (examples: Violation of arms embargo, violation of export, import or transfer bans or of licensing obligations. In the case of violations of export restrictions (exporting goods, engaging in trade and brokering transactions or providing technical assistance), the penalty under section 18(2) AWG is imprisonment for up to five years or a fine in the case of a merely negligent violation. If the offence is even committed on a commercial basis, Section 17 (3) of the AWG or Section 18 (8) of the AWG provides for a custodial sentence of not less than two years, so that a suspended sentence is regularly no longer possible. Therefore, there is always a high risk for companies that the public prosecutor's office and the court will affirm a particularly serious violation of foreign trade law and thus exclude the application for or imposition of a fine instead of imprisonment.

Outside the criminal law area, there is also the threat of fines of up to EUR 500,000 pursuant to section 19 AWG or up to EUR 1,000,000 pursuant to section 130 Administrative Offences Act in the case of criminal conduct by employees as a result of inadequate supervision. These fines can also be imposed on the company itself, Section 30 Administrative Offences Act.

Among the possible legal consequences of a violation of US re-export law is an entry on the **Denied Persons List** (so-called "Black List"), which means a ban on US companies from continuing to do business of any kind with the blacklisted company for a limited period (a few years to over 50 years) or indefinite period. However, the freezing of assets in the USA, administrative sanctions and heavy fines for companies and individuals, as well as long-term prison sentences (up to 20 years) against management in the case of serious violations are also possible. These would be enforced as soon as the persons concerned set foot on American soil.

In many cases, however, the **damage to a company's image** caused by media coverage of an export violation is probably even more serious than these material losses. In view of these risks, the importance of a functioning internal export control system cannot be overestimated.

PENAL AND ANTI-DUMPING DUTIES

Countries want to improve their domestic industry by imposing so-called punitive tariffs, among other things. Recently, the USA, China and the EU in particular have initiated various protectionist measures, and a tariff dispute has flared up.

The customs dispute is mainly about so-called punitive, countervailing

and anti-dumping duties. For example, under certain conditions, the EU can impose "**punitive duties**" on imports from non-EU countries to protect against trade practices that are considered unfair. If duties are imposed to protect against dumped goods, they are called "**anti-dumping duties**". Penal duties to protect against the import of subsidised goods are called "**countervailing duties**".

Since 18 October 2019, the US has been imposing punitive tariffs of 10% and 25% on a wide range of goods of EU origin because of the Airbus dispute. In addition to aircraft, a variety of foodstuffs such as cheese, yoghurt, coffee, olives and pork products are affected, but also certain hand tools, induction furnaces and excavators. Changes to these punitive tariffs came into force on 18 March 2020. The punitive tariffs on aircraft will be increased from 10 to 15 percent.

Due to illegal subsidies for the aircraft manufacturer Boeing, the EU may now impose punitive tariffs on US goods in the amount of EUR four billion as compensation for damage, according to a WTO ruling. This means that the EU will impose punitive tariffs of 15% and 25% on a range of goods of US origin. The 15% tariffs will apply to helicopters and aeroplanes. The 25% tariffs will apply to various agricultural products, chemicals, leather goods and machinery, among others. The duties are in addition to the normal third country duties. The details are contained in the Implementing Regulation (EU) 2020/1646.

CHANGES DUE TO BREXIT

Since the United Kingdom ("**UK**") is no longer part of the EU following Brexit, the circle of regulations to be examined has expanded for German companies. This primarily affects export controls, as comprehensive European regulations apply here that govern exports to third countries. Instead of the relatively rare transfer licences, export licences will be required more frequently as a result.

To compensate for the new licensing requirements, the Council of the EU has added the UK to the list of low-risk beneficiary third countries covered by EU General Export Authorisations (AGG No. EU001). It should be noted that AGG No. EU001 does not apply to exports of goods listed in Annex IIg.

Furthermore, BAFA has announced General Authorisation No. 15 (Brexit) - for the export of certain dual-use items after the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union of 20.11.2020 ("AGG No. 15").

The aim of AGG No. 15 is to enable affected economic operators to continue to fulfil contracts already concluded before 31.12.2020 without interruptions or delays in delivery for a certain transitional period.

The BAFA has set up a separate section on the topic of Brexit on its website. Here, the consequences of Brexit in terms of export control law are discussed and further links are provided.

Furthermore, compensatory procedural alleviations are also intended for the armaments sector.

The British government, through the Department for International Trade, has also developed guidelines on how to deal with goods subject to export licensing requirements and published them on its website.

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